

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMARCUS QUINN,

Defendant-Appellant.

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UNPUBLISHED

August 14, 2003

No. 239710

St. Joseph Circuit Court

LC No. 01-010747-FC

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and brandishing a firearm in public, MCL 750.234e. He was sentenced as a third habitual offender, MCL 769.11, to fifty to seventy-five years' imprisonment for the murder conviction, to six to ten years' imprisonment for the felon in possession of a firearm conviction, to two years for the felony-firearm conviction, and to ninety days' incarceration for the brandishing a firearm in public conviction. He appeals as of right. We affirm defendant's convictions, but remand for resentencing.

Defendant argues that there was insufficient evidence to support his murder conviction under an aiding and abetting theory. Reviewing this issue de novo, *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999), we disagree.

To support a finding that the defendant aided and abetted a crime, the prosecution must prove: (1) either the defendant or another committed the charged crime, (2) the defendant performed acts or gave encouragement that assisted the principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time that the defendant gave aid and encouragement. *People v Hattie Mae Tanner*, 255 Mich App 369, 418; 660 NW2d 746 (2003). An aider and abettor must have the same requisite intent as that required of a principal. *Id.* at 418-419, citing *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996).

The elements of second-degree murder are: (1) a death (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural

tendency of the behavior is to cause death or great bodily harm. *Id.* at 464, citing *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980).

Viewing the evidence in a light favorable to the prosecution, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992), a rational factfinder could have found beyond a reasonable doubt that Antonio Hunter shot and killed Anthony Banks with the requisite intent of malice, and that defendant assisted Hunter in this crime either with a malicious intent or knowing that Hunter was acting with malicious intent when Banks was shot. Several eyewitnesses testified that, after being in a fight with Banks, defendant ran to his car, obtained a gun, fired the gun into the air, handed the gun to Hunter, and told Hunter to shoot Banks. Further, several eyewitnesses, including Hunter, testified that Hunter shot Banks after defendant passed Hunter the gun and commanded Hunter to shoot Banks.

The jury was free to infer Hunter's malice from his use of a deadly weapon. *People v Jones*, 95 Mich App 390, 395; 290 NW2d 154 (1980). Moreover, a finding that Hunter intentionally shot Banks is, in and of itself, sufficient to support a finding of malice because malice may be inferred from evidence that the perpetrator "set in motion a force likely to cause death or great bodily harm." *People v Bulmer*, 256 Mich App 33; 662 NW2d 117 (2003), citing *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). Accordingly, the jury could have reasonably found from the evidence that Hunter shot Banks and that he did so with malice beyond a reasonable doubt.

Similarly, viewing the evidence in a light favorable to the prosecution, a rational factfinder could also have concluded beyond a reasonable doubt that defendant assisted Hunter in committing the crime of murder. Several witnesses testified that they saw defendant obtain a gun from his car and hand it to Hunter, and that they heard defendant then tell Hunter to "shoot the nigger." Others testified that they heard defendant tell Hunter to either "shoot him again" or "shoot that nigger again" after passing Hunter the gun. Hunter testified that he believed defendant was referring to Banks when defendant said "shoot that nigger again" because defendant aimed the gun toward Banks when defendant fired the first shot and because defendant and Banks had "scuffled" moments before the shooting.

A rational factfinder could also have concluded beyond a reasonable doubt that defendant acted with malice when he assisted Hunter, or at the very least, that defendant knew Hunter had a malicious intent when Hunter shot Banks. In light of the evidence presented at trial that defendant handed his gun to Hunter and told Hunter to shoot Banks, it would have been reasonable for the jury to conclude beyond a reasonable doubt that defendant intended to cause great bodily harm or at least intended "to set in motion a force that would cause death or great bodily harm" when defendant assisted in the commission of this crime. *Bulmer, supra*.

Further, the jury could have inferred from defendant's words and actions that defendant knew Hunter would follow his instruction and shoot Banks with the intent to cause great bodily harm. A jury may infer an aider and abettor's state of mind from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime.

At trial, Hunter testified that he is defendant's distant cousin and had been defendant's close friend for five years. Further, several witnesses testified that after defendant had been

involved in a fight, he ran to his car, brandished a gun, fired the gun into the air, passed the gun to Hunter, and instructed Hunter to shoot Banks. Defendant's lack of intent argument is further belied by evidence presented that after the shooting, defendant fled to Kalamazoo, Chicago, the Great America theme park, and Minneapolis.

Because a rational jury could have found from the evidence that (1) Hunter murdered Banks, (2) defendant provided Hunter with a gun and encouraged him to shoot Banks, and (3) defendant intended for the shooting to occur or knew Hunter intended it when defendant assisted Hunter, the evidence was sufficient to support defendant's second-degree murder conviction under an aiding and abetting theory. We find no merit to defendant's argument.

Next, defendant argues that the trial court abused its discretion when it denied defendant's motion for a mistrial despite a prosecution witness' reference to a polygraph examination in his trial testimony. Reviewing this issue for an abuse of discretion, *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000), we disagree.

As a general rule, references to taking or passing a polygraph test are not admissible in a jury trial. *Id.* at 97. While this Court has adopted a "bright-line rule" that such references constitute "error," this Court applies a five-prong test to determine whether the error is such that it requires reversal. *Id.* at 97-98.

In *People v Kiczenski*, 118 Mich App 341, 346-347; 324 NW2d 614 (1982), we restated the five-part test to be applied in order to determine whether an error mandating reversal has occurred:

In *People v Rocha*, [110 Mich App 1, 8-9; 312 NW2d 657 (1981)] this Court discussed the issue of a witness's unsolicited reference to a polygraph examination:

"Nonetheless, reference to polygraph examinations need not always constitute reversible error. A reference may be a matter of defense strategy, the result of a nonresponse [sic] answer, or otherwise brief, inadvertent and isolated. Thus, in prior cases, this Court has analyzed a number of factors to determine whether reversal is mandated. This Court should consider: (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted." [Internal citations omitted.]

Applying this test we conclude that the trial court did not abuse its discretion in denying defendant's motion for a mistrial. Hunter's reference to the test was unsolicited and unrepeatable. Further, Hunter's reference did not reveal the test results. In addition, Hunter's polygraph reference was a response to a question that defense counsel posed, rather than a reference that the prosecutor solicited in order to bolster the witness' credibility. Because each of these factors weigh in favor of denying the mistrial, defendant was not deprived of a fair trial.

Further, although defendant argues that there was a sufficient possibility that the jury may have resolved a credibility issue by referring to the polygraph testimony, the court's cautionary instruction forbade the jury from considering whether Hunter took such a test and what the results of the test might have been. Therefore, because the jury is presumed to have followed its instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), the jury could not have considered the test or its possible results in resolving a credibility issue. Accordingly, the trial court did not abuse its discretion when it denied defendant's motion for a mistrial based on Hunter's reference to the polygraph test at trial.

Defendant also argues that the prosecutor violated defendant's due process rights when he failed to disclose the benefit that Hunter was receiving from his plea and sentence agreement in exchange for his trial testimony against defendant. Reviewing this unpreserved claim of prosecutorial conduct for plain error that affected defendant's substantial rights, we disagree. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

There is no indication that Hunter testified falsely regarding his expectation of leniency. On the contrary, when Hunter was asked to describe his plea agreement, Hunter testified, "My plea agreement was that it falls within my guidelines, and that I give a truthful testimony." Further, although Hunter testified that he did not know what effect his testimony would have on his sentencing, there is no indication that this statement was false. Hunter may have been unsure whether the prosecutor would consider his testimony to be "truthful" or may not have known exactly how his testimony would ultimately impact his sentence.

Further, in both the opening statement and closing argument, the prosecutor informed the jury that Hunter had been promised a sentence within the legislative guidelines for second-degree murder if he testified truthfully at trial. Thus, the prosecutor cannot be deemed to have failed to correct any potentially false testimony. In addition to the prosecutor's statements regarding the plea agreement, the trial court also told the jury that Hunter was facing life imprisonment for first-degree murder but that if Hunter pled guilty to second-degree murder and testified truthfully at trial, the prosecution would recommend that the court sentence Hunter to a term of years within the legislative guidelines range.

Thus, contrary to defendant's assertions on appeal, the jury was not uninformed regarding the sentencing agreement that Hunter had with the prosecutor. Although the jury may not have been aware that the sentence would be reduced to exactly fifteen years' imprisonment, the jury was aware that Hunter would receive some sort of reduced sentence as a result of testifying truthfully at trial. Thus, the jury was able to consider what effect that promise might have on the credibility of Hunter's testimony. Accordingly, defendant has failed to establish a plain error that affected his substantial rights.

Defendant next argues that the prosecutor deprived defendant of his right to a fair trial by engaging in misconduct that included vouching for the credibility of his witnesses and denigrating defendant and his witnesses. Again, reviewing this unpreserved issue of prosecutorial misconduct for plain error affecting defendant's substantial rights, *Leshaj*, *supra* at 419, we disagree.

Our Supreme Court has held that a prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, it is not improper for a prosecutor to comment on a witness' credibility during closing arguments or to suggest that a witness is telling the truth. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). Further, a prosecutor may argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Here, the prosecutor never argued to the jury that he had special knowledge unknown to the jury that any of his witnesses were testifying truthfully. Rather, the prosecutor recapped his witnesses' testimony and compared that with the testimony of the defense witnesses and suggested to the jury that it could trust the prosecution witnesses' testimony. Because the prosecutor did not refer to any special knowledge on his part that his witnesses were trustworthy and because a prosecutor may argue that a witness is not worthy of belief, the prosecutor's conduct was not improper.

Similarly, the prosecutor suggested that the jury believe Hunter because Hunter gave the jury "just the facts," had already pleaded guilty to second-degree murder, and had nothing "riding on" the jury's acceptance of his testimony. In contrast, the prosecutor pointed out that defendant had a motive to lie to avoid being convicted, and further noted that defendant's testimony did not match the testimony of many other witnesses. Because the prosecutor could argue from the facts that defendant was not trustworthy, did not indicate to the jury that he had special knowledge of Hunter's truthfulness, *Bahoda*, *supra* at 276, and did not vouch for Hunter's credibility based on the prestige of the prosecutor's office, *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995), the prosecutor's conduct was not improper. Accordingly, the prosecutor's comments during his closing argument did not amount to a plain error that affected defendant's substantial rights.

Defendant further argues that the prosecutor engaged in impermissible conduct when he suggested that defendant was trying to avoid responsibility for his acts. In particular, defendant challenges the prosecutor's references to defendant's slanted testimony, his inconsistent answers, his act of fleeing from Three Rivers after the shooting, and his attempt to hire Tyrone Washington to testify in his favor. However, the prosecutor was free to infer guilt from the evidence presented at trial, and was not required to use the least prejudicial evidence available to him or to state his inferences in the blandest terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *Bahoda*, *supra* at 282. The prosecutor's references to defendant's slanted testimony, flight from the scene, and attempts to buy favorable testimony were properly utilized to attack defendant's credibility and infer guilt. We find no error.

Next, defendant argues that the trial court erroneously relied on multiple prior convictions arising from a single incident to enhance defendant's sentences as a third habitual offender.<sup>1</sup> Defendant further argues that his trial counsel was ineffective in failing to inform the

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<sup>1</sup> Although defendant's January 18, 2002, judgment of sentence provides that defendant was sentenced as a second habitual offender pursuant to MCL 769.10, the actual sentences that the court imposed for defendant's second-degree murder conviction and his felon in possession of a

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sentencing court that defendant should not have been treated as a third habitual offender. We agree.

We review defendant's unpreserved sentencing issues for plain error that affected his substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). Further, to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001).

In *People v Stoudemire*, 429 Mich 262, 278; 414 NW2d 693 (1987), modified on other grounds *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990), our Supreme Court held that multiple convictions arising out of a single incident count as a single prior conviction for purposes of the habitual offender statute. Here, defendant's presentence investigation report indicates that defendant's two prior felony convictions did arise from a single criminal incident, his March 10, 1999, arrest for domestic violence. At sentencing, defendant's sentence was enhanced by his two prior felony convictions. The minimum sentence guidelines range for defendant's second-degree murder conviction in defendant's sentencing information report is 270 months to 675 months, reflecting an enhanced sentence as a third habitual offender. However, under the clear import of *Stoudemire*, defendant's two prior convictions, stemming from the same criminal incident, should only be considered as one conviction for purposes of the habitual offender statute. Thus, his guidelines range for his second-degree murder conviction should have been 270 months to 562 months. Moreover, the sentencing court's minimum sentence of fifty years' imprisonment for the murder conviction exceeds the appropriate guidelines range because fifty years is the equivalent of six hundred months. Further, because the court's error affected defendant's term of imprisonment, it constitutes a plain error that affected defendant's substantial rights. Where a sentencing court imposes a sentence outside the appropriate guidelines range because of a mistake of law, remand is necessary to correct the error. *People v Kimble*, 252 Mich App 269, 280; 651 NW2d 798 (2002), lv granted 468 Mich 870 (2003).

Likewise, MCL 750.224f provides that a felon in possession of a firearm may not be imprisoned for more than five years. However, the trial court, pursuant to MCL 769.11, enhanced defendant's sentence to twice the longest term prescribed by law, or ten years, and then sentenced defendant to six to ten years' imprisonment for this conviction. Because defendant's two prior felony convictions arose from a single criminal incident, the court should only have sentenced defendant to a maximum sentence to 7½ years, or "1-½ times the longest term prescribed for a first conviction of that offense . . . ." MCL 769.10. Here, though defendant's six-year sentence falls below the maximum sentence the court should have imposed, it violates the two-thirds rule of *People v Richard Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972).

A sentence with too short an interval between the minimum and maximum terms frustrates the intent of the indeterminate sentence act; any sentence that has a minimum that

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firearm conviction indicate that the court sentenced defendant as a third habitual offender.

exceeds two-thirds of the maximum is improper. *People v Thomas*, 447 Mich 390, 392; 523 NW2d 215 (1994); *Richard Tanner*, *supra* at 690. Moreover, the two-thirds rule of *Richard Tanner* applies to sentences imposed under section 10 of the habitual offender act. MCL 769.10(2).

Here, the minimum sentence that the sentencing court imposed for defendant's felon in possession of a firearm conviction was six years. However, using the correct maximum sentence of 7½ years pursuant to MCL 769.10, defendant's minimum six-year sentence exceeds two-thirds of his maximum sentence. Accordingly, the trial court committed plain error that affected defendant's substantial rights when it sentenced defendant to six to ten years' imprisonment for the felon in possession of a firearm conviction. When a sentence violates the two-thirds rule, the proper remedy is to reduce the minimum sentence. *Thomas*, *supra* at 392-394. Therefore, we reduce defendant's minimum sentence for his felon in possession of a firearm conviction to five years' imprisonment.<sup>2</sup>

Defendant also requests a new sentencing judge for his resentencing. This Court applies the following test to determine whether resentencing should occur before a different judge:

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (internal citations omitted.)]

In the instant case, as in *Hill*, the court's sentencing error involved a question of law because the error resulted from the court's failure to treat defendant's two prior convictions as a single conviction for enhancement purposes. Thus, contrary to defendant's assertions on appeal, there is no indication that the sentencing judge would have difficulty setting aside his previous erroneous view. Accordingly, we find it unnecessary to reassign this case to a different judge for resentencing.

We affirm defendant's conviction, but remand for a resentencing regarding defendant's murder conviction. On remand, if the sentencing court believes that the total score and corresponding sentence is inadequate, the court may depart from the guidelines as long as the court determines that there are substantial and compelling reasons for the departure and provided

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<sup>2</sup> We need not address defendant's claim of ineffective assistance of counsel, which is based upon these sentencing issues because even if we granted defendant relief on that issue, he would get no further relief than that which he is already obtaining through re-sentencing. *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995).

that the court proceeds in accordance with the statutory requirements. *Kimble, supra* at 281. We do not retain jurisdiction.

/s/ William C. Whitbeck  
/s/ Michael R. Smolenski  
/s/ Christopher M. Murray